Tressler Lutheran Home for Children t/a Frostburg Village of Allegany County Nursing Home *and* United Food and Commercial Workers Union, Local 692, United Food and Commercial Workers International Union, AFL–CIO–CLC. Cases 5-CA-11890, 5-CA-12413, 5-CA-12424, and 5-CA-13010

August 24, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 28, 1981, Administrative Law Judge Benjamin Schlesinger issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Tressler Lutheran Home for Children t/a Frostburg Village of Allegany County Nursing Home, Frostburg, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(d):

"(d) Revoke, rescind, and expunge from its records the unlawful warning issued to Ronald Hartman on November 27, 1979, and all references thereto; the unlawful warning issued to Sally Wilburn in October 1979 and all references thereto; and the unlawful suspension imposed on Arlene Schrock on February 7, 1981, and all references thereto."

2. Add the following as new paragraph 2(e) and renumber subsequent paragraphs accordingly:

"(e) Expunge from its files any reference to the discharges of Ronald Hartman, Eleanor Bennett, Elizabeth Beckman, Sally Wilburn, and Arlene Schrock and notify them in writing that this has been done and that evidence of their unlawful discharge will not be used as a basis for future personnel actions against them."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate our employees concerning their union activities and sympathies and the union activities and sympathies of our other employees.

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[1] In its exceptions, Respondent contends that the Board's exercise of jurisdiction here is improper because Respondent is affiliated with the Lutheran Church of America. In finding that the assertion of jurisdiction here is proper, we note that the Board considered and rejected Respondent's contention in a prior proceeding involving Respondent, 254 NLRB 223 (1981).

Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In agreeing with the Administrative Law Judge that Respondent violated Sec. 8(a)(1) of the Act when its administrator, Leo Cyr, told employees that he did not want them to discuss the Union in the building or on company time, Chairman Van de Water and Member Hunter place no reliance on *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

In the section of his Decision entitled "The Remedy," the Administrative Law Judge found, *inter alia*, that since Respondent has exhibited union animus and particularly directed its unlawful activities against the discriminatees herein, it should be required to expunge all warnings from the files of these employees even though some of these warnings were not discriminatorily motivated. We disagree with the Administrative Law Judge's recommendation and shall modify his recommended Order so as to remedy only the specific violations found herein.

As the Administrative Law Judge found and we agree that Respondent unlawfully discharged Ronald Hartman, Eleanor Bennett, Elizabeth Beckman, Sally Wilburn, and Arlene Schrock, we shall also order the expunction of any reference to these discharges from Respondent's files. See *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).

WE WILL NOT instruct our employees to remove union pins from their uniforms.

WE WILL NOT create an impression among our employees of surveillance of their activities on behalf of United Food and Commercial Workers Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO-CLC.

WE WILL NOT promulgate, maintain, and enforce any rule or regulation prohibiting our employees from soliciting on behalf of any labor organization on our premises other than immediate patient care areas, during our employees' nonworking time, or prohibit without our written authorization the distribution of union literature in nonworking areas during our employees' nonworking time, and reprimand or warn our employees for violation thereof.

WE WILL NOT direct our employees not to talk about the Union in our facility or on company time.

WE WILL NOT promise our employees greater wage increases should they not select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with the loss of existing benefits and that we would start from zero in bargaining with the Union should they select the Union as their collective-bargaining representative.

WE WILL NOT threaten our employees with discharge and unspecified reprisals for engaging in union activities.

WE WILL NOT discharge, suspend, or otherwise discipline our employees because of their membership in, assistance to, or activities on behalf of the Union.

WE WILL NOT discharge, suspend, or otherwise discipline our employees because they have testified in a proceeding under the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Ronald Hartman, Eleanor Bennett, Elizabeth Loar Beckman, Sally Wilburn, and Arlene Schrock immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered by reason of our discrimination against them, with interest.

WE WILL reimburse Arlene Schrock for all legal expenses incurred in her defense of the charges of physical and mental abuse filed by us with the Frostburg Police Department and the Maryland Division of Licensing and Certification.

WE WILL notify, in writing, the Maryland Division of Licensing and Certification, the Frostburg Police Department, and any other state, municipal, or local agency contacted in connection with our charges against Arlene Shrock, that all references to alleged patient abuse by her are rescinded and that she has been reinstated to her former position of employment, with full rights and privileges, pursuant to an Order of the National Labor Relatioins Board; and send copies of said notices to Schrock.

WE WILL revoke, rescind, and expunge from our records the unlawful warning issued to Ronald Hartman on November 17, 1979, and all references thereto; the unlawful warning issued to Sally Wilburn in October 1979 and all references thereto; and the unlawful suspension imposed on Arlene Schrock on February 7, 1981, and all references thereto.

WE WILL expunge from our files any reference to the discharges of Ronald Hartman, Eleanor Bennett, Elizaeth Loar Beckman, Sally Wilburn, and Arlene Schrock and WE WILL notify them in writing that this has been done and that evidence of their unlawful discharge will not be used as a basis for future personnel actions against them.

WE WILL cease giving effect to and rescind our rule prohibiting solicitation, distribution, or posting of material or notices without prior written authorization from our administrator or insofar as it applies to the exercise of our employees' rights under Section 7 of the Act in areas of our facility other than those involving immediate patient care and insofar as it prohibits distribution of union literature during our employees' nonworking time in areas other than immediate patient care areas of our facility.

TRESSLER LUTHERAN HOME FOR CHILDREN T/A FROSTBURG VILLAGE OF ALLEGANY COUNTY NURSING HOME

DECISION

STATEMENT OF THE CASE

BENJAMIN SCHLESINGER, Administrative Law Judge: This proceeding, which was heard by me in Frostburg, Maryland, on January 19-23 and 28-30, 1981, involves the discharge of four employees allegedly in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 28 U.S.C. § 151, *et seq.*, and numerous alleged violations of Section 8(a)(1), based on charges filed by United Food and Commercial Workers Union, Local 692, United Food and Commercial Workers International Union, AFL-CIO-CLC (herein the Union). After the hearing closed and briefs were filed, a new complaint issued in Case 5-CA-13010, based in part on the discharge of another employee who testified during January, it being alleged that the discharge was in violation of Section 8(a)(3), (4), and (1) of the Act.[1] Hearings on that complaint were held in Cumberland, Maryland, on May 13 and 14, 1981. Respondent denied that it violated the Act in any manner alleged in any of the complaints.

Upon consideration of the entire record,[2] including my observation of the demeanor of the witness, and of the briefs submitted by General Counsel and Respondent, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

Tressler Lutheran Home for Children, a nonprofit Pennsylvania corporation, is engaged as a health care institution in the operation of and trades as Frostburg Village of Allegany County Nursing Home (herein Respondent or the Home) in Frostburg, Maryland. During the 12 months prior to the issuance of the complaints, representative periods, Respondent received gross revenues in excess of $100,000 from the operation of the Home and purchased and received, in interstate commerce, products valued in excess of $50,000 directly from points located outside the State of Maryland. Although Respondent denied that it is subject to the jurisdiction of the Act and filed a motion to dismiss the instant proceeding, the Board has ruled (254 NLRB 223 (1981)) that Respondent is and has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction over it. Being bound by Board law, I so conclude. I also conclude, as Respondent admits, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

1. Background

The alleged unfair labor practices involved in the January 1981 hearings occurred before and after two representation elections held at the Home. Upon a petition filed by the Union on November 19, 1979, an election was conducted on January 16, 1980, for a union of service and maintenance employees, nursing assistants, physical therapy assistants, ward clerks, orderlies, dietary employees, housekeeping and laundry employees and maintenance employees, but excluding, *inter alia*, professional employees, which included registered nurses (herein RNs), who were stipulated to be supervisors within the meaning of the Act, and licensed professional nurses (herein LPNs). The Union won that election and was certified, upon the overruling of Respondent's objections, on April 15, 1980.

On May 2, 1980, the Union filed another petition, and an election was held on June 12, 1980, this time for the technical employees, which included and consisted solely of LPNs, whom the Regional Director determined constituted a residual group because they had frequent contact with the nursing assistants, worked the same hours, and had similar working conditions. A self-determination election was therefore directed to determine whether the LPNs wished to be included in the then existing service and maintenance unit represented by the Union. The Union won that election, too, and was certified on August 26, 1980, after Respondent's additional objections had been overruled, one of which, significant herein, was that LPNs were supervisors and thus were ineligible to vote.

2. The crux of the issues—credibility and motivation

Each of the five employees allegedly performed acts which could have contributed or led to Respondent's decisions to impose discipline. The principal questions herein are whether Respondent perceived of those acts as serious violations requiring termination, or whether the acts which were allegedly committed were merely the pretexts to hide Respondent's ulterior illegal motive to discharge the employees because they supported the Union. In turn, whether there was illegal motivation rests upon whether Respondent's witnesses were believable, because each of its principals averred that union activities played no part in their decisions.

There are a number of facts which play a part in this Decision. Leo J. Cyr, Respondent's administrator, who was called by the General Counsel as an adverse witness

[1] The Union was formerly known as Retail Stores Employees Union, Local 692, United Food and Commercial Workers Union, AFL-CIO, and filed its initial charges under that name. Before the first day of hearings, the Union reaffiliated, and a motion was made to amend the name to reflect the Union's present name, which I granted without opposition. The relevant docket entries are as follows: The charge in Case 5-CA-11890 was filed on February 5, 1980, and amended on March 19, 1980, and a complaint issued on March 20, 1980. The charge in Case 5-CA-12413 was filed by the Union on July 18, 1980, and a complaint issued on August 22, 1980. The charge in Case 5-CA-12424 was filed on July 22, 1980, and amended on August 1, 1980, and a complaint issued on August 22, 1980. The three complaints were consolidated for hearing on August 28, 1980, and, at the January hearings, additional amendments to certain of the complaints were made. The charge in Case 5-CA-13010 was filed on February 10, 1981, and amended on March 10, 1981, and a complaint issued on April 9, 1981. On April 10, 1981, the General Counsel moved to reopen the prior proceeding and to consolidate the new complaint with the then closed proceeding. Over Respondent's opposition, I granted the motion by Order dated April 21, 1981.

[2] Certain errors in the transcript are hereby noted and corrected.

on the first day of the January hearings, had almost no recollection of the events which led to the discharges of the employees. Eleven days later, when called by Respondent to testify, Cyr's recollection had improved immeasurably, testifying, often with specificity, to dates, times, places, and events. I regard his sudden gain of information with intense suspicion.[3] In addition, I found him frequently to be evasive and argumentative and, in general, lacking in candor.

Another fact is that many of Respondent's current employees testified; and, although it may not be said with assurance that their testimony must be regarded as truthful, the mere fact that they placed their jobs at possible risk by offending Respondent has been deemed to be some indication that they would attempt to state the truth as best they knew it. *Georgia Rug Mill*, 131 NLRB 1304, 1305, fn. 2 (1961), modified in other respects 308 F.2d 89 (5th Cir. 1962); *Gold Standard Enterprises, Inc.; Gold Standard Liquor Store at Ridge Avenue; Chalet Wine and Cheese Shops, Ltd. at Fullerton Avenue; Chalet Wine and Cheese Shops; Ltd. Highview Park*, 234 NLRB 618 (1978), reversed on other grounds 607 F.2d 1208 (7th Cir. 1979). Yet another fact which must be considered is that much of Respondent's "proof" of many of the rule violations was solely a narration by supervisors of what employees reported to them. Although such testimony was admitted to support contentions that the supervisors were truly motivated by those reports, the hearsay statements prove nothing else. Certainly, they do not lend credence to whether the underlying violations upon which Respondent relies were in fact committed. I have taken into account the absence of the witnesses who could have but did not support Respondent's underlying defense.

Furthermore, to the extent that there is testimony which conflicts with my findings, I credit the witnesses whose testimony I rely upon. In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice: "It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *N.L.R.B.* v. *Universal Camera Corporation*, 179 F.2d 749, 754 (2d Cir. 1950). See, generally, *N.L.R.B.* v. *Walton Manufacturing Company & Logansville Pants Co.*, 369 U.S. 404, 408 (1962).

Finally, it is true that the discharges of some of the employees might be viewed as overreactive in the circumstances. However, Board law makes clear that an employer may discharge an employee for good reason, for bad reason, or for no reason at all, as long as its decision is not motivated by the employee's protected concerted or union activities. But bad reasons or no reasons have their limitations. Such may, with knowledge of the employees' union activities, provide enough guidance to conclude that the reason or lack of one was merely a pretext for the only reason the employer actually had—to rid itself of union activists and to discourage the union adherence of other employees. Although the line may be thin between a valid nonreason or valid bad reason and an invalid pretextual reason, the line must be drawn in these very difficult cases.

Respondent contends that the discipline it imposed flows from violations by the employees of rules set forth in its "Employees' Handbook," which provides certain regulations established for the guidance of all employees and states that "willful or inexcusable breaches of these rules will be dealt with firmly under a uniform policy which applies equally to all departments and all individuals." On the other hand, the handbook also states that Respondent's policy is "to be patient, sympathetic, fair and tolerant in the administration of" the Home.

Of necessity, the departure from a "uniform policy" which is "patient, sympathetic, fair and tolerant" must be considered. These are Respondent's guidelines, and deviations should be deemed suspect, at least to the extent of determining whether illegal motivation was the true cause of the discipline.

3. Respondent's rules and regulations

The specific rules and regulations which are at issue are as follows:

GROUP I RULES:

Commitment of any of the following offenses will result in:

1st Offense: Oral warning with written notation
2nd Offense: Written warnings
3rd Offense: Termination of employment

1. Discourteous, unattentive or unprofessional treatment of the patients/residents.

2. Disharmony with fellow employees, supervisors, patients, doctors, visitors, auxiliaries or volunteers.

* * * * *

7. Solicitation, distribution or posting of material or notices without prior written authorization from the administrator.

8. Failure to report to work at the assigned time.

* * * * *

10. Leaving the facility during work hours without permission of the supervisor.

* * * * *

[3] Another of Respondent's witnesses conceded that her recollection of a fact resulted solely from being told it by Respondent's counsel.

12. Failure to give at least two hours notice prior to reporting time of an illness or emergency preventing work.

13. Interfering or interrupting the home operations while visiting in the work areas or on the village/facility.

GROUP II RULES:

Commitment of any of the following offenses will result in:

1st Offense: Written warning
2nd Offense: Termination of employment

* * * * *

3. Willingly negligent or knowingly failing to report unsafe or unsanitary conditions.

4. Engaging in obscene, abusive language and/or malicious gossip and/or the spreading of rumors, or harassing fellow employees.

5. Absence from the work assignment without a reasonable excuse. Documentation of the reason for absence is required unless waived by the supervisor.

GROUP III RULES:

Commitment of the following offenses:

1st Offense: Cause for immediate termination without warning.

* * * * *

2. Conviction of a crime.

* * * * *

4. Engaging in immoral conduct of indecency on village/facility.

5. Physical or verbal mistreatment of the residents/patients.

* * * * *

11. Insubordination.

* * * * *

14. Job abandonment.

NOTE: A combination of violation of any three rules and regulations listed in Groups I and II shall be just cause for termination of services; however, personnel records will not accumulate a single violation of any rule in Groups I and II which does not recur within one year from the date of the infraction.

4. Pat Keller—a comparison study

As a gauge in determining Respondent's motivation, I note its treatment of Pat Keller, one of its nursing assistants, who was first disciplined when she left the Home on October 12, 1979, over the expressed opposition of her "immediate supervisor," Kathy Clise. For that, then Acting Director of Nurses Phyllis Roque (and, since late December 1979, director of nurses) gave her an oral warning with written documentation for violation of group I, rule 10. The warning was not signed by Keller, Roque explaining that oral warnings did not have to be signed.

On another occasion, which I infer took place later, Keller called RN Edna Slonaker to inform her that she could not come to work because she had no snow tires. The roads, however, were clear of snow. For that, she was given another oral warning, despite the fact that a written warning seemingly was required because it was a second offense of a group I rule.

On yet another occasion, Keller telephoned from Baltimore at or about noon, long after she was due to work, and stated that she could not report to work. She was given no warning. On yet other occasions, she did not report to work, she came to work late, and she came to work hung over. No discipline was meted out. In December 1979, Keller requested a leave of absence from the Home; she was not discharged nor did Respondent request that she take a leave of absence, even though, shortly before, she had missed some days because of her inability to work. Roque admitted that she told Keller that, when she was able to work, she should notify Respondent so that she might be rehired.

Although Roque testified that she had thought that Keller favored the Union, it will become apparent, as discussed, *infra*, that there was a more than adequate basis for the discharge of Keller for violation of numerous of Respondent's rules (including two, insubordination and job abandonment, that seemingly required immediate discharge); yet the option of termination was never exercised, whereas the discriminatees herein were treated much more harshly. That disparity forms a basis for the conclusions reached herein.

B. *The Discharge of Ronald Lee Hartman*

Ronald Lee Hartman, with Sally Wilburn, another dischargee, the principal and outspoken union adherent, began employment as a nursing assistant in March 1979, and was assigned to additional duties of keeping control of supplies and, in July, of being the fire and safety coordinator, for which he was paid an additional 35 cents per hour. In mid-September, he began his efforts to organize the employees, signed a union authorization card on October 1, and attended a union meeting with 20–25 other employees on or about October 12. About a week before, Cyr asked Hartman whether he had heard anything about a union. Hartman replied that he had heard some talk, but not much. This conversation was not denied by Cyr; and I find and conclude that Cyr's conduct constitutes interrogation illegal under Section 8(a)(1) of the Act.

Shortly after the first union meeting, on or about October 15 or 16, Cyr held a meeting of the employees in the Home's dining room. He announced that there was a union which was attempting to organize the employees, but stated that he was not particularly concerned about it and saw no need for it. Cyr stated that the employees were receiving what Respondent could afford, and that a

union could not get any more, because Respondent had nothing more to give. Several employees spoke, one of whom stated that, when a union organized employees, the staff pays no attention to patient care. Hartman suggested, however, that in his experience, it was not a union which caused a decline in patient care, but a decrease of personnel at the facility.

About a week later, Cyr met with Hartman and stated that Hartman had really fooled him and that he did not realize that Hartman favored a union until Hartman made his statement at the meeting. He said: "[L]et's put our cards on the table and be honest with each other." Hartman confessed that he favored the Union, that Respondent was being unfair with its employees, and that a union could be helpful. Cyr explained that there was only so much money available, that Respondent was limited in great part to receipts of fixed Medicaid benefits, and that there was not enough to give the employees more. In addition, Cyr stated that Hartman's position as fire and safety coordinator was causing him embarrassment and problems with the supervisory staff, because Hartman was being very open about his support of the Union. About the same time, or perhaps toward the end of October, RN Slonaker directed Hartman to remove the union pin which he was wearing on his collar. Hartman told her that if she would remove her pin (a nursing association pin) he would remove his. Slonaker countered that hers was a professional insignia. Hartman defiantly continued to wear his pin.

In late October, Hartman was removed from his position as fire and safety coordinator. Two months later, on January 2, 1980, he was terminated for reasons General Counsel alleges are pretextual. First, the General Counsel attacks the *bona fides* of an evaluation given to Hartman on September 13, 1979, noting that Hartman was treated as a probationary employee and that Hartman had long since completed his 90 days' probationary period. However, the union organizing campaign had not commenced by the date of his evaluation (September 10) and Hartman had not become active in his support of the Union by that date. I thus conclude that the evaluation, which contains an oral warning about Hartman's failure to follow a proper chain of command, to utilize his time on patient care, and to report to work on time, was not based on considerations which are illegal under the Act.

I have greater problems understanding Respondent's position regarding its reevaluation of Hartman on November 20, 1979, more than a month after Respondent first learned of Hartman's union adherence. On this second evaluation, Hartman was still deemed a probationary employee. More important, Slonaker conceded that Hartman's work, tardiness, and time engaged in patient care had improved, although he was still not following the proper chain of command;[4] yet Respondent graded Hartman lower in almost every category of its evaluation and none of its witnesses adequately explained why this was so. The second evaluation, as did the first, provided that Hartman would again be reevaluated in another 60 days (the first provided for reevaluation in 30 days), but Hartman's employment did not last that long.

On November 27, Hartman received his second warning. That morning, he had reported to work at 6 a.m., an hour before his normal starting time, and awoke and prepared his patients a half-hour earlier than usual so that he could go to court to testify as a character witness for a friend. At 7 a.m., he obtained permission from the two LPNs on his station to leave. He left the premises about 8:30 a.m. and returned shortly after 10:30 a.m. Slonaker, the RN on his station, was not present; and Hartman did not ask permission of the RN on the other station or of anyone else.

Hartman was warned for violations of group I, rule 10 and group II, rule 5. The General Counsel contends that he violated neither rule, having left the Home with permission of his supervisor and having had a reasonable excuse. Respondent argues that Hartman should have gone to RN King and that his excuse was not reasonable. As to the latter contention, Roque testified that if Hartman had merely called in sick that day, even though he was not sick, that would have satisfied her. She appeared to be more concerned that Respondent had notice of Hartman's absence from work, rather than attacking the reasons for his absence. That claim is particularly unavailing in light of Respondent's frequent disregard of Keller's absences. In any event, there was no proof that Hartman's excuse was a sham; to the contrary, it was legitimate and could not be construed as lacking in reason.

Respondent's argument that Hartman should have obtained the approval of RN King rests on its duplicitous interpretation of the meaning of "supervisor" set forth in its rules. It concedes that LPNs supervised direct patient care and directed the nursing assistants, albeit under the overall control of the RN on duty. And there can be no question that Respondent claimed, in its objections to the Board-conducted election of LPNs, that LPNs were supervisors, in order to upset the results of that election. But, here, at the January hearing, it suited Respondent's purpose to define a "supervisor" as excluding LPNs to support the discipline of Hartman because he was a leading advocate of the Union. This conclusion is bolstered by Respondent's use in the warning of two rule violations, one of which, that Hartman's court appearance was not a reasonable excuse, was unsupported by any evidence. Upon inquiry at the hearing, Roque posited that the stating of two rule violations for the same act would be considered as one warning, but there is nothing in the rules, particularly the ambiguous "NOTE" quoted, *supra*, which would indicate that to an employee. Rather, it appears that the group II violation was inserted to make the warning more severe than it actually and unjustifiably was.

Furthermore, a comparison with Respondent's treatment of Keller for a similar violation is once again helpful. Although Roque attempted to justify the disparity by noting that Keller, in violation of "her immediate supervisor's instructions," left the Home for only 15–20 minutes, the fact remains that Roque set forth only a group I violation by Keller, not the additional group II violation that Hartman was also charged with and not a group III

[4] None of Respondent's witnesses knew what Hartman had done to be criticized for not following a proper chain of command.

violation for insubordination, requiring immediate discharge. Further, Clise, an assistant physical therapist or rehabilitation aide, who was concededly an employee within the meaning of the Act, was named as the "supervisor" who denied Keller permission to leave the Home. At the May hearing, Sue Ann Ostendorfe, one of Respondent's supervisors, explained that it was the duty of all nursing assistants to report claims of patient abuse to their supervisors, who, she claimed, consisted of both RNs and LPNs. I find nothing improper in Hartman's obtaining of permission from the LPNs on his station. I note that neither LPN testified. I credit Hartman's testimony that he obtained their permission and discredit the hearsay testimony of Roque that one of the LPNs advised her that Hartman simply told the LPN that he was leaving and that he did not receive permission to do so. I also note and credit Hartman's testimony that, prior to the union campaign and with Roque's knowledge, he had received permission from an LPN to leave the Home and he was never warned therefor.

The final warning and Hartman's termination resulted from two separate events. On January 2, 1980, Hartman was in the room of Arta Gall, a resident who was hard of hearing. Hartman testified that Gall, who had been a member of a union in his earlier years, was talking about unions. Hartman stated to Gall, in a loud voice so as to be heard by Gall, but which was also overheard by a passerby, that, if there were as many workers in the Home as there were supervisors, there would be no problems. Although at that time there was no prohibition against employees talking with patients about the Union or their union activities—indeed, employees were encouraged to talk with their patients in furtherance of Respondent's policy of making the Home as much as a "home" as possible—I find that Hartman's statement went beyond the issues of union organization and employees dissatisfaction and attacked and belittled Respondent's management of the Home. It, therefore, exceeded the bounds of propriety and Respondent could readily find that his remark was offensive and tended to create disharmony, possibly within the broad definition of group I, rule 2.

But Hartman's discussion the same day with Norma Simpson exceeded no such bounds, and in fact constituted protected concerted activities. Employees had made known their concern that one employee had been counseled for eating a piece of toast in the residents' dining room, whereas other employees were allowed the use of the dining room. Because this constituted an economic benefit, their concern was protected. Hartman talked with Simpson in the laundry room and asked whether, when she ate in the dining room, she had to pay for her meal. He opined that her free meal violated the Act. Simpson said that she was allowed to eat there only when she was acting as a supervisor.

Contrary to Simpson's testimony and that of Mary Ella Zimmerman, supervisor of the housekeeping and laundry departments, I find it difficult to believe that Simpson was being harassed by Hartman. Nor do I find that any disharmony was created, unless Respondent suggests that "disharmony" is synonymous with "difference of opinion." If that truly portrays Respondent's case, any time there is an organizing campaign at a facility, with some employees favoring organization and others opposed to it, an employer could terminate any employee it wished. However, inasmuch as any concerted activity must commence with some sort of communication which may or may not be received favorably, it would nullify the right to engage in such activity if protection were denied because the communication failed to bear fruit. *Mushroom Transportation Company, Inc.* v. *N.L.R.B.*, 330 F.2d 683 (3d Cir. 1964). The gist of Respondent's brief on this point appears to concede the concerted nature of Hartman's discussion, while arguing that the activity was not protected because Hartman was away from his own work duties as he talked with Simpson. It is true that the location of his discussion was raised in the testimony, but ever so slightly. I find that Respondent was principally concerned with the subject matter of the discussion, not its location. In any event, of all the rules in Respondent's guidelines, no matter how broadly they were interpreted from time to time, Hartman was never charged with being away from his worksite at the time of his discussion. The charges made were solely "disharmony" and "harassment."

I conclude that the Act protects this conversation and that the discipline of him violated Section 8(a)(1) of the Act. It further violated Section 8(a)(3) because I find no basis for the charge of violation of Respondent's rule, other than Hartman's well-known union activities. As Cyr stated, he felt that Hartman had been trying to "create mistrust of management" and that the Simpson incident "just confirmed really, the mental state that he was in and that he had been in for sometime, obviously."

That "mental state," I conclude, was Hartman's promotion of the Union. Similarly, I find Roque's description of Hartman as "defiant" and her statements that "he involved himself in areas where he had no business involving himself in" and that she had a problem with his "general attitude" are all indicative that support of the Union motivated Respondent's discipline and discharge of Hartman.

As a result, at the time of Hartman's termination, I find valid only his prior oral warning on the evaluation, dated September 13, 1979, and the warning for creating disharmony in his conversation with a resident on January 2, 1980. Under Respondent's rules, these two violations are insufficient to support Respondent's discharge of Hartman, which I conclude violated Section 8(a)(3) and (1) of the Act.[5]

As previously concluded, Respondent, in Cyr's first conversation with Hartman, engaged in illegal interrogation in violation of Section 8(a)(1). Cyr's second conversation with Hartman about a week after his meeting with the employees on or about October 15 or 16 suffered from the same infirmity, again in violation of Section

[5] Respondent contends throughout its brief that its handbook set forth a procedure whereby employees could grieve any of their problems or concerns to their supervisors, then to Respondent's administration, and then to Respondent's office in Pennsylvania, and that the failure of the discriminatees herein (including Hartman) to follow that procedure constitutes "acquiescence . . . that the written warnings were justified." No legal authority is given to support this contention, which I find lacks commonsense, logic, and legal justification.

8(a)(1). The complaint also alleges that, by Cyr's statements that the Union would be unable to "squeeze blood out of a turnip," created a feeling of futility in violation of the Act. Even in the context of Respondent's other unfair labor practices found herein, Respondent did not indicate that it would not bargain or that such bargaining would result in absolutely no benefits or gains or, for that matter, no written agreement. Nor does the record demonstrate that Respondent's assessment of its financial status was incorrect. *Madison Midwest Nursing Care, Inc., d/b/a Anna-Henry Nursing Home*, 236 NLRB 1135, 1139 (1978), is analogous. There, the employer claimed that it could not guarantee a raise. Here, Cyr did little more. I find no violation. Finally, I find that Slonaker's direction to Hartman to remove his union pin also violated Section 8(a)(1) of the Act. There is nothing to indicate that the wearing of a union pin violated any of Respondent's rules. Although in a health facility there is clearly a difference between the wearing of a professional and union pin, Slonaker's direction was intended only to impede union activities, and for no other justifiable and reasonable business purpose. *St. Joseph's Hospital*, 225 NLRB 348 (1976).

C. *The Discharge of Eleanor Bennett*

Eleanor Bennett was a part-time housekeeper who worked on all weekends and holidays and substituted for employees who were on vacation or sick. She also worked on other days pursuant to a schedule prepared by Zimmerman who posted it on the employees' bulletin board on a Friday, every 2 weeks, for a 2-week period commencing the following Wednesday.

Respondent's knowledge that Bennett was engaged in union activities is based on Bennett's conversations with Norma Simpson and Shirley Spiker, both alleged to be agents and supervisors within the meaning of Section 2(11) of the Act, which allegations Respondent denied. Bennett testified that Spiker was the acting supervisor of the kitchen department, when admitted Supervisor Norma Scarpelli was not present; and that she saw Spiker designated as acting supervisor on forms Bennett had to fill out. The record is barren of any other testimony regarding Spiker's duties and responsibilities. There was substantially more testimony regarding Simpson, who was Zimmerman's assistant; was in charge of the office when Zimmerman was out of town; infrequently performed Zimmerman's functions, such as writing up orders, taking inventories, and handing out checks; from time to time ate with the Home's residents, as did other supervisors; and was treated as a supervisor by Respondent, which instructed her not to vote in the first election a few days prior to that election.[6]

Bennett, a member of the union organizing committee, attended almost all the union meetings, made telephone calls to employees to persuade them to become active in the Union, and tried to enlist employees to come to union meetings. She testified that in late November or early December, she attempted to persuade both Simpson and Spiker to sign union cards and asked both of them to attend union meetings to listen to the union claims, because both related their negative reactions to the union organizing drive.

I conclude that the General Counsel has not produced sufficient evidence of Spiker's supervisory status, there being nothing in the record to show what powers she exercises and what she does. Her designation as acting supervisor is insufficient proof of her status. *Henry A. Young, d/b/a Columbia Engineers International*, 249 NLRB 1023, 1030, fn. 11 (1980). Whether Simpson was a supervisor or agent is a closer question; at least some proof was elicited about what she did. But neither Hartman nor Bennett understood her to be a supervisor or Respondent's agent, Hartman discussing with her why she ate in the dining room when other *employees* were not permitted to do so, and Bennett asking her to come to union meetings and to sign a union card. Nor does Bennett's testimony support a finding that Simpson exercised supervisory powers. Notwithstanding these conclusions, I find that, as hereafter discussed, Respondent had knowledge of Bennett's union activities.

Bennett's employment record was perfect from the date she was first employed, January 27, 1979, until shortly after she approached both Simpson and Spiker. On December 19, 1979, she was given a warning for an incident which had occurred a month before, on Saturday, November 17, 1979. She and other housekeepers were directed to clean up the arts and crafts room for a special affair.[7] While waxing two large tables in the room, Bennett used a can of spray wax which she sprayed directly onto the tables; but some wax was sprayed beyond the sides of the tables and onto the floor, which became slippery as a result. When that condition was recognized, Bennett and her fellow employees mopped the floor twice in order to clean off the wax; and, when they left, they put up a sign stating "Wet Floor." Apparently, the slick had not been fully eliminated, and someone slipped and fell later that day.

Respondent did not call any of the employees to testify about this incident, but instead relied upon the testimony of Zimmerman, who testified to the results of her investigation—that she examined the floor the following Monday and found it to be like an "ice skating pond," that she talked during the following week with three of the housekeepers and none knew about wax spilling on the floor, but that, a month later, one employee had informed her that Bennett went around the room with a can of Pledge wax and sprayed it all over the floor. Because the room was 50 by 70 feet, I find the latter fact highly unlikely, and equally improbable that Zimmerman would believe it.[8]

[6] Simpson stated that she had been advised not to vote by Cyr; Cyr denied that he did.

[7] Zimmerman testified that the housekeepers were to clean only the floors that Saturday. Why that would be necessary in light of the fact that the floors are waxed by male maintenance employees every Friday was unexplained.

[8] In its brief, Respondent explains that the efforts of all the housekeepers to wash the floor merely spread the wax throughout the room. If that were so, and it is contrary to what Zimmerman stated that she had been told by one housekeeper, then all of the housekeepers would have clearly been involved in creating the dangerous condition. Yet, only Bennett was disciplined.

Further, I distrust her narration, which attempts to support the warning solely by uncorroborated hearsay testimony. Although the results of her investigation were admitted to determine Zimmerman's motivation, Respondent must prove its case by something more substantial. In light of the admission that signs were posted indicating that the floor was slippery, I find that the other housekeepers must have been aware of the condition and Zimmerman's testimony of her conversations with the housekeepers should not be credited. Rather, I accept her concession that she felt that unions had no place in nursing homes and credit Bennett's testimony (and discredit Zimmerman's denial) that on or about November 3, 1979, the day after a union meeting at which Bennett was named a member of the Union's organizing committee, Zimmerman stated to her that she was aware of union organizing going on in her department, that she was aware that there had been a union meeting the prior night, and that she had lived long enough without a union and was going to do so now. Her knowledge, I infer, must be attributed to Simpson, who, if not her closest and most intimate friend, was clearly more than Zimmerman's employee and who attended a union meeting in early November which was (I again infer) the one at which Bennett was designated a member of the Union's organizing committee. Without this knowledge, Zimmerman would have had no reason to make her statement to Bennett about the union meeting.[9]

When Zimmerman's motivation was put to the test, the facts of the events leading to Bennett's second warning and her discharge fall into place. As noted above, Zimmerman normally posted the work schedule for her department on Friday. She did not do so on Friday, January 4, 1980. When Bennett worked that weekend, January 5 and 6, the schedule had not been posted; and Bennett assumed that her next dates of employment were to be the following Saturday and Sunday, as they always had been. When she arrived for work on January 12, she looked at the schedule which had been posted the preceding Monday, and found that she was off that Saturday but had been scheduled for Friday, January 11. She reported to RN King that she was at the Home and asked whether she should work. Upon King's advice, Bennett telephoned Zimmerman at home, and Zimmerman said that Bennett should follow the schedule—"whatever it says, you do." Bennett went home.

On Monday, January 14, 1980, Zimmerman gave Bennett a warning notice and informed her of four alleged wrongs: (1) that she did not report off on January 11; (2) that she caused a disturbance on January 12; (3) that she went into the storeroom on January 12 and put wax on the floor, in the same way as she did on November 17, 1979; and (4) that she had taken one of Zimmerman's antiunion posters off the bulletin board, rumpled it, and threw it on the floor. Bennett explained to Zimmerman why she had missed work on January 11 and denied at the hearing the rest of the allegations. Zimmerman told Bennett to go home and come back on January 19, when her case would be further discussed. When Bennett stated that she had no way home, Zimmerman said that was her problem. Bennett met Cyr and explained that she was worried about a remark she had made the previous Saturday that Cyr would pay for her cab home. Cyr replied that she ought not worry about it, and further "Next week is the election. After the election, if everyone votes the right way, this will be a good place to work. Now, keep that in mind."

Bennett voted in the election on January 16, without challenge. Bennett reported for her meeting on January 19, while Zimmerman was preparing a new schedule for the housekeeping department. Zimmerman commented, "By now, I'm sure that you're aware that the Union won the vote." When Bennett noted that Zimmerman was making up a new schedule, Zimmerman said that the schedule was none of her concern and asked Bennett to sign a resignation. Bennett refused and, after some discussion of the events of the week before, was terminated.

The above is based on Bennett's testimony and Zimmerman's failure to contradict Bennett's testimony of the remark about the union election victory. I discredit Zimmerman's other testimony and various denials for the same reasons as stated above. Again, the overall effect of Respondent's case was diminished by its failure to corroborate Zimmerman's hearsay testimony and, thus, its lack of any evidence to support directly the charges made against Bennett, with the exception of Bennett's absence on January 11. The hearsay will simply not withstand scrutiny when applied to the principle of fairness outlined in Respondent's rules.[10] The absence of January 11, although Bennett may not have been totally blameless,[11] was caused essentially by Zimmerman's failure to post the schedule so that part-time weekend workers could see it.

Zimmerman, despite her acknowledged duty to run her department efficiently and her responsibility to ensure that employees are made aware of the days that they are expected to work and to ensure that the employees work those hours, contended that the schedule was posted timely; and only upon prodding did she concede that Bennett, when she completed her work on Sunday, January 5, 1980, could not have seen the schedule, because it had not yet been posted. Yet, she made no attempt to advise Bennett that she was to work on Friday, January 11, insisting that it was Bennett's respon-

[9] Zimmerman admitted that she knew of Bennett's union adherence only on December 19 because, when she gave Bennett the first warning, Bennett replied that Zimmerman should realize that she was putting Bennett between the Union and Respondent. By crediting Bennett's testimony, I find that, although not specifically alleged in the complaint, Zimmerman engaged in giving Bennett the impression of surveillance of her union activities. The matter was fully litigated by the parties and is sufficiently related to the subject matter of the complaints to justify a specific finding of a violation of Sec. 8(a)(1) of the Act. *Southwestern Bell Telephone Company*, 237 NLRB 110 (1978).

[10] As discussed, *infra*, concerning the discharge of Sally Wilburn, Respondent argues in its brief that certain statements made by a resident should not be credited, as follows: "All the testimony about what Mrs. McMullen allegedly stated is hearsay, tainted with all of the defects of hearsay testimony."

[11] Bennett testified that she telephoned Zimmerman twice at home, without success, to see if she had been assigned to work that week. She also testified that she attempted to reach King at the Home, also without success. However, Bennett testified that she averaged 3 to 4 days' work each week, and she must have assumed that she would be scheduled to work on days other than the weekend.

sibility, and hers alone, to check the schedule, testifying that other part-time employees had called her.[12] The difficulty with this explanation is that Zimmerman had earlier testified that the other part-time housekeepers had *not called*. Although Zimmerman's rationale may be explained as simply an exercise of double standards,[13] the inconsistency is nonetheless important in assessing whether her professed motivation is credible.

This inconsistency is not the only one contained in her testimony. Zimmerman attributed the rescheduling of Bennett to only weekdays and giving her off on the weekend for the first time since Bennett started work on January 27, 1979, to a requirement set by Respondent at its home office in Pennsylvania that Zimmerman reduce the hours of her staff. Thus, she began to give the part-time housekeepers weekends off so that only four housekeepers would work on weekends, rather than five. As noted above, one of Bennett's violations was an alleged disturbance ("disharmony") on January 12, caused in part by her erasure and alteration of the schedule which was Zimmerman's first implementation of the new policy. With Bennett not scheduled for the weekend of January 11–12, there were only four housekeepers scheduled, consistent with Zimmerman's testimony. But inconsistent is the fact that Zimmerman scheduled five housekeepers for the following weekend, thus making her rationale for the change of schedules, at best, questionable.

I found that Bennett was a truthful and sincere witness[14] and have little reason to believe that she would alter the schedule (or that she would purposefully create a dangerous condition by waxing floors with a known slippery substance).[15] In addition, I discredit the basis of Zimmerman's allegations, because her assumption that Bennett erased that portion of the schedule which indicated that she was to work on Monday, January 13, cannot be reconciled with the fact that Bennett reported to work that Monday (after erasing the notation that she was to work on Monday). Zimmerman seemingly put this discrepancy out of mind, declaring that Bennett had told her that the reason she reported for work on Monday was that she called the Home late Sunday night and had a nursing assistant check the schedule to ascertain whether she was scheduled for work. There is no evidence that Bennett went to the Home between Saturday and Monday, and Zimmerman, knowing that the schedule had been altered, should have wondered how the assistant read that Bennett was scheduled to work on Monday, when Bennett erased the entry the previous day.

Zimmerman never questioned this, but made broad, unsubstantiated assumptions of Bennett's culpability.[16] I have no doubt that Zimmerman criticized Bennett for her removal of an antiunion leaflet from the employees' bulletin board, even though Zimmerman, conceding that her recollection was unclear, insisted that she found crumpled on the floor an advertisement for a "soup sale," which was of no moment and which would not have been a topic for her criticism of Bennett. But there is mention in Zimmerman's January 18, 1980, warning of Bennett of "four different counts," and I find it significant that Zimmerman would recall the insignificant soup sale leaflet. Indeed, it would be more in keeping with Zimmerman's attitude that she would blame Bennett for the removal and crumpling of an antiunion leaflet, which Zimmerman conceded she often posted. I credit Bennett's denial of this incident and her narration that it was an envelope containing an anniversary card from her children which was the document involved.

The warnings that Zimmerman gave are further indicative of Zimmerman's motive, for she expanded upon the alleged violations in a way that implied that Zimmerman was seeking to make her punishment stick. As to the November 1979 incident, she warned Bennett both for creating the slippery condition and not reporting the hazardous condition. Bennett testified that she reported the matter to the ward clerk, because Zimmerman was not at work that day and because it was the clerk who was in charge of the intercom and would have been able to seek out the appropriate authority to rectify the situation. Zimmerman stated that only she should have been advised and that notifying the ward clerk was inappropriate. Later, she said that during her investigation and before she gave Bennett the warning, she checked with the ward clerk who could not remember whether Bennett had so informed her. Still later, she recanted, stating that she did not check with the clerk until after the warning was given. Why she would have asked the ward clerk only after the warning was unexplained; and I find it improbable that she checked with the clerk at all.

I further find that Bennett's selection of the ward clerk, instead of telephoning Zimmerman, was not a violation of any of Respondent's rules. The rule which Bennett is alleged to have violated does not state a duty to report the condition to a supervisor, but only an obligation to report it. The hazard, if it was such, was clearly marked by Bennett, and was evident even by the following Monday. Further, if the condition were as serious as Zimmerman indicated, it is curious that, once informed of it on Saturday, she did not report to work until

[12] RN Margaret Ann Grimes Elliott testified that on a number of occasions, when an employee had not reported to work, she called the employee to find out what the problem was. She issued no warnings.

[13] Zimmerman frequently discussed religion with another housekeeper during working hours. That apparently presented no problem to Zimmerman, but Hartman's discussion of working conditions with Simpson during working hours was not to be equally tolerated.

[14] To the contrary, I have discredited materially the testimony of Zimmerman. Although it is often difficult, if not impossible, to articulate the reasons for credibility determinations based solely on demeanor, I note that in critical portions of Zimmerman's cross-examination, her voice cracked and she became visibly nervous.

[15] Zimmerman sought to create a rationale for Bennett's actions by explaining that she had scheduled Bennett for a day off on Thanksgiving Day and that Bennett was angry that she had not been given Christmas Day, to which she was entitled if preference by seniority had been followed. However, Zimmerman's understanding of Bennett's motivation was narrated almost solely through hearsay statements: not one of the housekeeping employees so testified. I cannot credit Zimmerman's hearsay testimony. In one respect, Zimmerman testified to some direct knowledge—that she had been told by Bennett of her complaints on the telephone. However, earlier in Zimmerman's testimony, she testified inconsistently that she never discussed Thanksgiving Day with Bennett. I discredit her later testimony to the contrary.

[16] Assumptions were part and parcel of Zimmerman's actions. Instead of testifying that Bennett telephoned her at home a little after 7 a.m. on Saturday, January 11, she stated that Bennett came to work a little after 7 a.m.

Monday and she did not give warnings to the other housekeepers who must have been aware of the alleged hazard.[17]

Weighed against Respondent's avowed policy of fairness, Zimmerman's treatment of Bennett falls far short in the balance. This initial warning of December was based on statements of various employees, none of whom Respondent saw fit to produce. I infer that they would not have testified as Zimmerman would have me believe. The second and final warning was a mixture of the same faults which pervaded the first. Bennett was warned not only for failing to appear for her day's work but also for failing to give 2 hours' notice that she would not appear, a single violation compounded into two violations and sharply different from Respondent's treatment of Keller (although similar to Respondent's treatment of Hartman). Furthermore, the second warning, according to Zimmerman, encompassed the same conduct which gave rise to the first warning, Zimmerman explaining that the disharmony involved in the second warning was Bennett's deliberate spraying of wax which caused the arts and crafts room floor to become slippery. In explanation, Zimmerman then began to expand upon the faults she found with Bennett's conduct, testifying that Bennett had missed an earlier weekend and that the disharmony she had created was "just one incident after another," commencing in November 1979 (coincident with the early stages of the Union's organizing drive).

As may already be evident, I found Zimmerman's testimony to be inconsistent and contradictory, and I do not credit her. Rather, I find that her conduct varied from the dictates of fairness mandated by Respondent's regulations, particularly in light of the testimony of other of Respondent's witnesses that supervisors often excused absences without notice or, at least, did not issue warnings because of such conduct. In these circumstances, the reasons for the discharge of Bennett, unsupported almost completely by persons who witnessed the violations for which Bennett was discharged—and, particularly, the discharge occurring after the hiatus of her employment, and only after the Union won the election—are pretextual at best, lacking and unbelievable at worst. I conclude that her discharge violated Section 8(a)(3) and (1) of the Act.

The complaint alleges that Respondent also violated Section 8(a)(1) of the Act by Zimmerman's telling Bennett that her removal of the antiunion petition was a factor in the decision to discharge her. General Counsel's brief does not indicate the theory of this allegation, which I find in these circumstances fails to state a violation of the Act. It is true, as discussed, *infra*, that Respondent's rule prohibiting the posting of notices violated the Act. That does not imply that a necessary corollary to the right of union adherents to post notices is the right to remove posters they do not like. If employees do not have the latter right, then it is not improper for an employer to tell them so. I so conclude.

[17] If there were such a hazard—an "ice skating pond" *query*, why the Home left the floor in that condition over the weekend.

D. *The Discharge of Elizabeth Loar Beckman*

Elizabeth Loar Beckman, an employee since January 15, 1979, originally a nursing assistant and then a ward clerk, was terminated on January 30, 1980, after her second incident of alleged use of obscenities in violation of group II, rule 4. Although the General Counsel makes some contentions about the inequity of the first violation, the written warning could not have been motivated by any illegal purpose under the Act, because it occurred on June 30, 1979, months prior to the beginning of union organization. The inquiry then turns to the events of January 30, 1980, which Respondent claims constitute the second offense which justified Beckman's discharge for group II violations.

Despite Roque's denial, I find that Respondent was aware of Beckman's support of the Union. Beckman, who appeared to be a sincere young lady, albeit one endowed with a quick and sometimes acerbic tongue, had been aware that certain tensions arose with the onset of the union drive. After Roque gave a speech to the nursing staff in early December 1979, Beckman felt that Roque was correct in complaining that the employees had been treating her differently since the union campaign started and had been paying too much attention to union organization to the detriment of patient care. As a result, she told Roque and Margaret Ann Grimes, her RN, that, although she was for the Union and was going to vote for it, she was sorry if she treated them differently and hoped her union support would not interfere with their friendship. A few weeks or so before, she had also expressed her support of the Union to Harriet King. King did not testify, and Grimes essentially supported Beckman's narrative, which I find credible. And, because Grimes corroborated Beckman's testimony, I find it probable that Beckman also expressed her thoughts to Roque, despite Roque's testimony that one day Beckman, upset, stated to her that they were friends, that Roque should not worry about her because the employees did not need a union, and that she was not for the Union. I discredit Roque's testimony, finding it improbable that Beckman would express her support for the Union to two supervisors, yet state the opposite to a third.

What went on at Beckman's desk on the afternoon of January 30, 1980, was subject to differing testimony. Beckman testified that LPN Maria Shockey came to her desk to call Roque to explain that her patient was in bad health and that the patient's physician stated that he did not have time to come to the Home. Shockey said she could not believe the doctor's attitude, to which Beckman commented: "If there were less assholes in the world, it would be a better place," and therapist Kathy Clise said that the doctor would probably wait until the patient died and only then would he come to the Home to sign a death certificate.

Sometime later, Beckman's mother, who had quit her job at the Home 1 or 2 days before, telephoned Beckman and told her that one of the nursing assistants had called her to say that another assistant had seen in her personnel file, a sheet of paper indicating that she had quit and that her leaving was all right because the Home needed dependable people anyway. Beckman told her mother

that anyone had access to open file folders, that information of that kind should have been placed in a sealed envelope, and that it was unprofessional to leave it in an open folder.[18]

Assistant Activities Director Faith Bittner, a supervisor and daughter of another of Respondent's supervisors, testified that she heard Beckman state that the facility was being run unprofessionally; that, if there were not so many assholes, it might be better; and that she would take up these matters with the Union, which would take care of them—and that is what she told Roque later, when she also reported that some of the patients' charts were missing. But Bittner was more bitter and upset about what one of the other employees, in the company of two others, had said about her as she left the nurses' station—to wit, "There goes another asshole." Roque, apparently unconcerned with the latter obscenity and with what appeared to be a clear allegation of harassing other employees—indeed, Roque at the hearing could not recall that Bittner said anything about the other employees—seized upon the Beckman incident and asked Bittner to prepare an immediate report on only that incident, which constituted Beckman's second warning for use of obscenities and the alleged cause for her discharge.

No satisfactory explanation was given by Roque why she targeted Beckman alone for discipline. I discredit her denial of knowledge (or lack of recollection) that she was told by Bittner of the verbal abuse that she was subjected to by the three other employees; and I discredit her narration of the incident. According to her, Bittner approached her in her office "just about hysterical . . . crying and upset." Bittner related first that Beckman said "unprofessional assholes in the world" and "this facility being run by unprofessional assholes"; and, second, that Jenkins (not Bittner) had been referred to as unprofessional. I find it wholly improbable that either of these events could have caused Bittner to be "hysterical," as Roque testified, and find that Bittner was upset, as she admitted, and that her emotional state was affected solely by what was said to her and about her. Roque was, in her testimony, attempting to conceal that fact, knowing that her choice of Beckman as the sole subject of discipline could not be justified when compared to the failure to punish the actual wrongdoers.

Finally, even if I credited Roque's testimony, I would be constrained to find that, so strongly was she motivated by a desire to rid her staff of union adherents, she closed her mind to rule violations committed by other employees.[19] At Beckman's exit interview on February 5, 1980, Cyr announced that since the "shenanigans" had commenced, Beckman's attitude had drastically changed. Those "shenanigans" could mean only the union campaign and Beckman's support of the Union, the factors which I find motivated her discharge. Cyr's comment that Beckman had no understanding of the "role she had to play in working in the framework of the context of a nursing home" has meaning only in the "context" of the union campaign. Roque's statement that Beckman's attitude had "changed" has similar import.

I conclude, therefore, that Respondent fired Beckman because of her union activities in violation of Section 8(a)(3) and (1) of the Act and that her use of an obscenity was merely the excuse and pretext to conceal Respondent's actual motivation.[20] The complaint also alleges that Cyr's comment at the exit interview constituted an independent violation of Section 8(a)(1) of the Act by "implying" that Beckman's union activity was a factor in Respondent's determination to discharge her. The pleadings thus suggest an alternative that Beckman's discharge did not violate Section 8(a)(3) of the Act, but Respondent's implication of illegal motivation violated Section 8(a)(1). It may be that such conclusions may some day be made; but it would seem that, once the implication is found, the motivation for the discharge, which is of the essence in these proceedings, has been proved, and no further independent violations need be considered. In light of my findings, *supra*, I will dismiss this allegation as redundant.

E. *Additional Alleged 8(a)(1) Violations*

Before considering the remaining two discharges which are subjects of the complaints herein, it is necessary to consider some miscellaneous alleged violations of Section 8(a)(1) of the Act, some of which bear tangentially upon the discharges of the employees, discussed *supra*, and especially upon the discharges of both nursing assistants Sally Wilburn and Arlene Schrock, the latter of whom testified at the January hearing to a number of violations.

In October 1979, Kay Trantham, then director of nurses, asked Schrock what the Union had to offer that Trantham could not. When Schrock asked Trantham what she was talking about, Trantham asked her whether she had heard about the Union, to which Schrock answered that she had heard rumors; but Schrock appar-

[18] I recognize that this statement is critical of Respondent, but it was made not to or in the presence of a coherent patient. Further, Respondent's warning to Beckman was solely for the use of an obscenity. Thus, this incident is different from that involving patient Gall and Hartman.

[19] While I find that Roque's insistence that Beckman be disciplined, to the exclusion of the other employees, evidenced disparity, I reject General Counsel's additional theory that the use of obscenities by employees had generally been condoned, although the rule appears to have been enforced only somewhat sporadically.

[20] My conclusion is based on the conflict between the testimony of Bittner and Roque and my disbelief of Roque's testimony in its entirety regarding this incident. I also note that, late in the January hearings, Respondent also relied, for the very first time, upon Beckman's overall work record, a clear shift from the reasons originally interposed as the basis for her discharge. It is thus unnecessary to resolve the conflict between Bittner and Beckman, although I am inclined to credit Beckman's testimony that she was not impugning the integrity of the Home. Bittner, the daughter of a supervisor and herself a low-level supervisor, stated as fact testimony which had been given to her by Respondent's attorneys prior to the hearing, was utterly confused as to meaningful dates and times, and changed her testimony about the effects of being called an obscenity (at first, it made no impression and then, on cross-examination, it upset her). From these facts, as well as her demeanor, Bittner demonstrated her opposition to the Union and willingness to side with Respondent. In addition, Bittner's testimony about Beckman's statement that she would correct the problems with the aid of the Union gives more closely with Beckman's testimony of her concern that her mother's file, containing adverse criticism, had been left open to the view of Respondent's employees. In crediting Beckman rather that Bittner, I am aware of other conflicts relating to Beckman's testimony, and credit Grimes, whom I found to be sincere and truthful, wherever her testimony conflicts with Beckman's.

ently kept whatever information she had to herself. In any event, Trantham repeated her first question, telling Schrock that the benefits granted by Respondent were the best in the area. Trantham did not testify, and I conclude that she engaged in interrogation illegal under Section 8(a)(1) of the Act.

Schrock also testified that in or about October 1979 she was very upset and frustrated with the patient care being given on other shifts and complained to Roque about it. Roque acknowledged that it had been going on and that employees had been "slacking off . . . since the union was coming in." Roque stated that she was sick of hearing about the "damn" union, that she would like to get rid of a lot of people, but that, while the union drive was going on, there was nothing she could do about them. General Counsel alleges that this constituted an implied threat to discharge employees because of their union activities. I do not read her statements that broadly. Rather, it appears that Roque was concerned with the possible effects of discharging employees upon the success of the union organizing campaign, then in its early stages, the first petition being filed in November. If employees had indeed not been performing their work because their interest was primarily directed to the union campaign, their union activities would not have insulated them from discharge. That Roque later threw this caution to the proverbial winds, as she clearly did, and, as I have found, for reasons violative of the Act, does not transform her October statement into an illegal threat.

I do, however, find an illegal 8(a)(1) threat by Roque (testified to by Schrock) in her statements on July 22, 1980, 6 days after the LPN election, at a meeting of LPNs and nursing assistants from unit 2. Roque said that she was sick of the employees' attitudes, that they ought to come to work with smiles on their faces, and that: "If you think I've played prick before, you haven't seen anything yet." She added that, just because the Union had won, did not mean that she could not fire anybody, that she had about 20 unfair labor practice charges filed against her and that she did not care if she had 20 more—she would still fire the employees. Clearly, the threat was one which reasonably could be understood by employees to be linked to the Union's successful campaign to become the employees' collective-bargaining agent.

The complaint also alleges that in February 1980, Roque promised employees benefits should the employees cross a picket line. Apparently, this is based on the testimony of nursing assistant Kelly Jenkins, who stated that, while discussing with Roque the possibility of employees at another nursing home going on strike, Roque said that, if Respondent's employees went on strike, they could be fired because the strike was illegal—"that the Union was not in and did not have a contract." Something, according to Jenkins, was said by Roque about there being "plenty of benefits." Although I have otherwise credited Jenkins, I found her recall of this conversation, which she testified to most haltingly, to be minimal and do not rely upon it. I dismiss the allegation. For the same reasons, I reject the General Counsel's attempt to convert the original allegation of a promise of benefits into one of an illegal threat of discharge.

In April or May 1980, Cyr held a meeting of all RNs, LPNs, and nursing assistants in which he complained, *inter alia*, of union stickers and literature being posted all over the Home. He stated that he did not want the Union discussed in the building or on company time. Although health facilities may justifiably limit union solicitation and distribution areas other than those involving patient care, *N.L.R.B.* v. *Beth Israel Hospital*, 437 U.S. 483 (1978), there is no legal justification for Cyr's overly broad prohibition, which I conclude violates Section 8(a)(1) of the Act. *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150 (1976), enfd. in relevant part 557 F.2d 1368 (10th Cir. 1977); *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981).

The last of the otherwise unrelated 8(a)(1) violations occurred on July 11, 1980, 5 days prior to the LPNs' election. Roque and Slonaker held a meeting of LPNs at which Roque stated, and Slonaker reiterated, that, when the LPNs joined the Union, a raise would be given to the Home's administrative employees and RNs, but not the LPNs; that, if the LPNs did not belong to the Union, they would get a raise, too; that they would also get a raise when the union employees received a raise, so that the LPNs would get two raises by not belonging to the Union, but only one, if they belonged to the Union. Roque further stated that the cost-of-living increase, previously granted in January and July, would be given only on July 1, but later reversed herself, saying that the Union would sue for it and it would be granted. Roque also stated that when Respondent had to bargain with the Union, the employees would lose all benefits and would have to start from zero.

The complaint alleges that Respondent violated the Act only by (1) promising greater wage increases to employees should they not select the Union and (2) threatening a loss of all existing benefits, should the employees select the Union. I conclude that Respondent violated Section 8(a)(1) of the Act in both respects. *N.L.R.B.* v. *Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Plastronics, Inc.*, 233 NLRB 155 (1977).

F. *The Discharge of Sally Wilburn*

Sally Wilburn, another of Respondent's nursing assistants, was continuously employed from December 22, 1978, to July 17, 1980, when she was terminated. There is no issue that, along with Hartman, she was the most vocal employee in her support of the Union and that her union activities were well known to Respondent. Respondent has denied that some of Wilburn's allegations of 8(a)(1) violations occurred, but I found her to be generally truthful and candid, whereas, as stated above, I have little regard for Cyr's truthfulness; and I found that Roque was so entirely overwhelmed by her perceptions of the Union's lurking behind all the faults of the Home that she was willing to risk the discharge of those she felt were union adherents and chance infractions of the Act.

Wilburn, like other employees, was subjected to illegal interrogation about her union activities. In mid-October 1979, Cyr asked her what the Union could give to her that Respondent could not. Wilburn replied: "Better

working conditions and job security." Cyr stated that the patients would suffer because their fees would have to be increased, but Wilburn stated that she could not see how that would come about. Cyr then stated that he did not think as much of Wilburn as he did before the union campaign and that she was not "the same girl." Wilburn replied that employees had a right to be union members. After this conversation, Wilburn complained to the Union, which wrote a letter to Cyr; and Cyr apologized to Wilburn, stating that he did not realize that he was badgering and harassing her.

That same month, Wilburn received her first warning. She posted a piece of union literature on the employees' bulletin board in the nurses lounge. RN Slonaker told her to take it down, which Wilburn did. Sometime later, Slonaker advised her that she was not allowed to put anything up and that the bulletin board was hers so that she could post notices to the employees. Wilburn was given a warning.

Respondent contends that its policy permitted the posting of notices only with the permission of its management. However, the bulletin board was used for notices other than Slonaker's business: posted from time to time were thank you notes from patients, announcements of weddings and baby showers, menus, and advertisements.[21] Although Respondent contended that all letters and postcards were censored in the administration office before being sent to the nurses or their assistants (including Cyr's initialing his approval on some of the posted material), I have little faith in that testimony. In any event, so long as Respondent permitted the nonbusiness-related material to remain on the bulletin board, there is in this record no legitimate business justification to support its right to permit the posting of union-related material only upon its permission to do so. Requiring an employee to submit such material for Respondent's inspection would permit Respondent to ascertain who supported the Union and who did not. It is hornbook law that Respondent may not interrogate employees to ascertain their union sympathies. Respondent may not do indirectly by applying and enforcing its rule what it may not do directly. Further, it is clear that Respondent may not condition the exercise of Section 7 rights upon its own authorization. *John H. Swisher & Sons, Inc.*, 211 NLRB 777, 779, fn. 7 (1974).[22] I conclude that the rule violates Section 8(a)(1) of the Act and Respondent's discipline of Wilburn on the basis of the illegal rule violates Section 8(a)(3) and (1) of the Act.[23]

On July 2, 1980, after work, Wilburn was involved in an altercation in the Home's parking lot with fellow employees Kelly Jenkins and Barbara Rafferty. As a result, Roque suspended each employee for 3 days[24] and disciplined RN Sherry Yutze for her failure to report to Roque that the employees had been bickering all day and that they had engaged in the altercation that afternoon.[25] Roque warned each employee that they were never to discuss the incident again, under penalty of discharge.

The final incident occurred 2 weeks later. According to Wilburn, as she was walking down the hall, she heard a disturbance coming from the room of one of the residents, Abby McMuller. Entering the room, she found nursing assistants Delores Broadwater and Linda Richards taking soiled clothes off McMullen, who was yelling "Union, union . . . the tall man [Cyr] is trying to get us to say something bad about you [Wilburn] . . . If it wasn't for you, I wouldn't have a dress on my back." Prior to Wilburn's entrance, McMullen had complained to the other assistants that Cyr had directed her to come to his office, where he had attempted to obtain information from McMullen to use to terminate Wilburn. Indeed, the day before, Broadwater and Richards were in McMullen's room when Cyr entered and asked McMullen to come to his office when she was able to do so.

When RN Linda Sandman entered the room to see what the commotion was about, Wilburn said he used no loud language in front of McMullen, but she complained to Sandman, in essence: "Look what they're doing to her. They have no right to do this," all in agreement with what McMullen was saying. Later, she and two other employees met with Sandman, who told them not to mention the incident to anyone. Still later, apparently after Sandman had reported this incident to Roque, Sandman again met with Wilburn, alone, and criticized Wilburn for her behavior. Wilburn protested that this incident and the fight with Jenkins were being used by Respondent as a pretext to have her fired. The next morning, Sandman took Wilburn to the office where Sandman stated that she had thought Wilburn had been warned about talking about the parking lot incident. Wilburn protested that she did not believe that incident had been disclosed publicly. Without much further discussion, Sandman presented a warning notice to Wilburn about her conduct in McMullen's room and her discussion of the parking lot incident, and Wilburn was terminated.[26]

[21] In addition, Slonaker posted antiunion leaflets on the bulletin boards (as did Zimmerman) and distributed antiunion material to employees in the employee lounges and in immediate patient-care areas.

[22] Respondent contends that Wilburn was a vocal and open union supporter in October 1979 and could have requested authorization from Cyr without fear of disclosing her union adherence. That is not Board law. *ITT Automotive Electrical Products Division*, 231 NLRB 878 (1977); *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 146 (1980)

[23] Respondent complains that the underlying validity of its rule forbidding solicitation was never alleged as an independent unfair labor practice. However, see fn. 9, *supra*, and my comments during the hearing that I felt it necessary to consider this matter. Even had Respondent introduced evidence of a business justification, that would have been unavailing in light of its own antiunion solicitation and use of the bulletin boards.

[24] The General Counsel contends that there is no proof that Jenkins was suspended, relying in part on Respondent's failure to produce Jenkins' warning. It was not incumbent upon Respondent to do so: the General Counsel could have subpoenaed the document. In any event, I note that Jenkins, although denying that she had been *told* that she was suspended, testified only that she asked for time off, and Roque stated that she was going to suggest it anyway.

[25] The discipline of Yutze should be compared with Zimmerman's failure to discipline the other housekeepers who knew of the dangerous and slippery floor allegedly created by Bennett and failed to report the same.

[26] In so finding, I discredit Wilburn's testimony that she never was informed of the reasons for her discharge. I do credit her with respect to Roque's unwillingness to give Wilburn the reasons for termination in writing.

Broadwater and Richards essentially corroborated Wilburn's narration of the incidents in McMullen's room, in that the commotion was caused solely by McMullen, and not by Wilburn. Sandman, however, placed more emphasis on the loudness of Wilburn, whom she heard yelling: "Now look what they've done. They shouldn't be allowed to do this." And, contrary to Roque, who testified that Sandman reported that McMullen was yelling "Union, union, union, I'm sick of hearing of it," Sandman testified that she did not hear what the patient had said, but that Wilburn explained to her that Cyr had called McMullen to his office and instructed her to watch over Wilburn.

As a result, according to Sandman, she reported the incident to Roque, explaining that it was very unethical for a patient to be asked to spy. She also discussed the behavior of the three employees as being loud and boisterous, and Roque directed her to tell the three employees that their behavior was not accepted. Sandman testified that she told the three employees that, and that it was not only unethical to ask a patient to spy, but that she did not believe it because there was no need to spy. Wilburn replied that Sandman did not know what kind of people she was working for, that Jenkins was ready to talk, and that the actions were part of a master plot, particularly by Slonaker and Roque, to terminate Wilburn. Sandman replied that she did not care about these allegations; that the only matter of importance was the need for peaceful working relationships. Therefore, she advised the employees that she did not want to hear the conversation brought up again, because it was disruptive. After speaking with Roque again, a warning notice was prepared on July 17, 1980, accusing Wilburn of violations of group I, rule 2, and group II, rule 4.

Interestingly, when Sandman first talked to Roque, Roque testified that, without investigation, she was convinced that McMullen's complaint had no basis, and the only issue she raised was that there should be some semblance of order in the patients' hall, which is the reason Roque requested Sandman to return to speak alone to Wilburn. But it also is apparent that Roque's immediate attention was drawn to the allegations against Wilburn. Indeed, regarding the fight in the parking lot, although Roque ultimately meted out equal discipline to the three employees involved, she encouraged (with Monica Mason, Respondent's assistant administrator) Jenkins to file criminal charges against Wilburn, noting that, if Wilburn were guilty, that would constitute a group III rule violation which would cause Wilburn's immediate termination. Later, Roque stated to Jenkins that she should not withhold issuing subpoenas, as Respondent would ensure that full coverage of staff would be provided to make up for those employees who were required to appear in court.

With this background of Roque's more than passing interest in Wilburn, as well as the earlier warning of Wilburn for her posting of union literature,[27] the motivation for Wilburn's discharge becomes evident. First, I note that Respondent's explanation for its actions against Wilburn was inconsistent, shifting, and contradictory. Roque testified that, after speaking with Wilburn on July 18, she and Cyr agreed that they had "no choice" but to terminate Wilburn.[28] However, Roque later admitted, in discussing Keller, that despite the fact that Keller had committed violations serious enough to warrant termination, supervisors had discretion whether and how to discipline their employees. Roque testified that Wilburn's disharmony was that created between her, McMullen, and the two employees; yet she conceded that they were all in agreement and there was no disharmony. On the other hand, Sandman ascribed the disharmony as between Wilburn and her, and indirectly Roque and Cyr, by making the accusations that Cyr was trying to get her and putting McMullen up to spy.

Wilburn's disruptive behavior was variously characterized as her agreement with McMullen's statements (Roque) and her harassing McMullen for spying and getting her upset (Sandman). Wilburn's spreading a rumor resulted from the fact that there was no basis for McMullen's comments, which Wilburn stated as factual (Sandman), because Wilburn stated that Jenkins was ready to tell all that she had been told to "get" Wilburn (Sandman), and because she made mention of a plot and was wrong to have believed McMullen's comments (Roque).[29] Sandman acknowledged that Broadwater was also upset, making a comment that "they should not be allowed to do this" and "look at how upset they have got her"; but Sandman, for reasons unexplained, did not find that Broadwater's words constituted a rumor or disharmony, in violation of Respondent's rules.[30] Roque stated that one of Wilburn's failures was that she did not investigate the matter; later, she admitted that Wilburn attempted to contact Monica Mason but was prevented from doing so by Sandman. But, argued Roque, that effort would have been unavailing in any event, because Mason did not know anything.

These shifts and turns in the testimony of Respondent's witnesses lead me to conclude that its testimony should be discredited, that Wilburn's testimony as recited above should be credited,[31] and that the discharge was, in any

[27] Wilburn was requested by Slonaker and Roque to sign this warning, Wilburn's first. She declined to do so, with the comment that "they told her not to do so." As a result, both Slonaker and Roque documented Wilburn's refusal. These facts must be compared with Roque's treatment of Keller, who did not sign her first oral warning, with written documentation, because, according to Roque, such a warning was not required to be signed. The request of Wilburn can be deemed only as a method to establish a predicate for the later discharge of Wilburn.

[28] In itself, this is an interesting admission, since Roque had earlier testified that, before she and Cyr decided to terminate Wilburn, they consulted with Respondent's home office in Pennsylvania. If there was "no choice," *query*, why did they feel the need to seek the guidance of the home office?

[29] Despite Roque's firm belief that Cyr would not have asked a patient to spy on an employee, she testified that she asked Cyr whether he did so, which was inconsistent with Cyr's testimony that she did not ask him. Further, I discredit Sandman's testimony that, when she originally went to Roque to report the incident, she told Roque that it was unethical for Cyr to use patients to spy on employees. Because Sandman did not believe that allegation, I find no reason for her so to report to Roque.

[30] Sandman also admitted that, if Wilburn had not made her statement in front of McMullen, nor alleged it as fact before the other employees, but instead had mentioned it to Sandman in private, there would have been no violation of group II, rule 4.

[31] In making this finding, I have not disregarded certain inconsistencies in Wilburn's testimony and contradictions between her testimony and that of other witnesses. Nonetheless, I find that she was essentially reliable and that most of her testimony should be credited.

event, unwarranted. Whatever disruption there was is attributable to the actions of McMullen, and Wilburn had no part in that, other than to parrot the statements of McMullen and to report to RN Sandman what had happened, which it must be presumed was the duty of a nursing assistant. Further, it is clear that Wilburn had been told by Roque not to *discuss*[32] the parking lot incident, but I have difficulty in finding that Wilburn's mere *mention*[33] of that event to Sandman, without any employee being present, constituted a discussion, which Roque said she would not tolerate. I have particular difficulty in finding any reasonable relationship between Wilburn's statement and the group II, rule 4 violation for which Wilburn was cited. Neither Roque nor Sandman conditioned her discharge on anything but a vague belief in avoiding disharmony among the employees *vis-a-vis* their relations with the Home's residents. I find no similar disharmony created by Wilburn's statement made in private to Sandman. Nor, apparently, had Respondent deemed that Jenkins violated its directions when Jenkins desired to pursue her criminal charges against Wilburn. Despite numerous "discussions" of the parking lot incident, Jenkins, rather than being disciplined, was urged to go forward and was offered Respondent's aid. In any event, even if there might arguably be some basis for Wilburn's discharge resulting from her mention of the parking lot incident,[34] and I hold there was not, nonetheless Wilburn's at best minor breach of Roque's warning was merely a pretextual reason for her discharge, her union activities being Respondent's real motivation.[35]

This conclusion is confirmed by Sandman's assumption that the reason why McMullen was saying "Union, union, union" was that the three employees had been discussing the Union in her presence. Indeed, Sandman admitted that "one of the things I told Sally, had it not been discussed in front of [McMullen], she couldn't have made that kind of statement." When this is coupled with Roque's assumption (proven or not) that the employees' union activities were interfering with patient care and that Cyr would never have attempted to use a patient to thwart union activities, the conclusion is clear that Roque, too, thought that Wilburn, the outspoken union adherent, whom Sandman characterized "as a leader among her peers" and a "mood setter," was causing McMullen's distress, and it was those perceived activities that caused Wilburn's discharge.[36]

Accordingly, I find that there was no basis for Wilburn's discharge, which I conclude violated Section 8(a)(3) and (1) of the Act.

G. *The Discharge of Arlene Schrock*

On February 4, 1981, 7 days after the initial hearing had closed, Sue Ann Ostendorfe, Respondent's social service director, met resident Meta Seifarth, who was sitting in a wheelchair outside of the main bath and who appeared to Ostendorfe to be unhappy or upset. Ostendorfe asked what was wrong, and Seifarth told her that she felt she was being mistreated; that Arlene Schrock, the nursing assistant in charge of her direct patient care, would not answer her lights, would not take her to the bathroom when she asked, and would not permit her to make decisions about what she could wear; and that Schrock would come into her room and "curse at her about having to come in and clean up shit and that she was going to get out of this damn job."

Ostendorfe asked for Roque's advice; and Roque stated that she would investigate the matter, which she did, obtaining the same complaints from Seifarth as had been told to Ostendorfe. Later, Ostendorfe met with Cyr and Roque and mentioned that this might be "patient abuse" under the recently enacted article 43, § 565G of the annotated code of Maryland entitled "Resident abuse in nursing homes."[37] Cyr and Roque then decided to

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[32] Roque stated that she informed each of the employees individually, after their 3 days' suspension that:

> . . . it was finished, that I did not want to hear any more discussion of it, that I didn't want it carried over back to the patient area, and that they each could consider that in itself a warning, that if indeed they did bring it up again an[d] start the same situation over again, because at that time, as I counseled each one of them, I informed them without warning they each could have been terminated; they had broken enough rules.

[33] The American Heritage Dictionary of the English Language (1st ed. 1969), defines "mention" as "to cite or refer to incidentally." "*Discuss*. involves close examination of a subject. . . ."

[34] Wilburn admitted that, if she ever brought up the parking lot incident on the premises, "that would be it." When the alleged violation of that warning was called to her attention, she defended herself by noting that she had not discussed the matters with other employees.

[35] I requested that the parties submit briefs on the issue of whether Wilburn was engaged in concerted protected activities, which was barred by Respondent's prohibition of any discussion of the parking lot incident. Upon reconsideration of this matter, I find that Wilburn's claim was purely personal and not concerted, for the benefit of other employees. However, during this proceeding, it was revealed that on numerous occasions, employees were forbidden from discussing various matters which arose at the Home, many of which involved their own discipline, a subject matter which I deem is just as much of concern to those employees as are their wages and hours of work. Board law makes clear that such restrictions and prohibitions adversely impinge upon employees' Sec. 7 rights. *Jeannette Corporation*, 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976); *Texas Instruments Incorporated*, 236 NLRB 68 (1978), enfd. in relevant part 599 F.2d 1067, 1073 (1st Cir. 1979).

[36] The General Counsel also argues that the reasons for Wilburn's discharge should be discredited because (1) Respondent deliberately withheld informing Wilburn of these reasons and (2) Sandman stated to all employees, after Wilburn's discharge, that no employee was to speak of either Wilburn's discharge or the parking lot incident, the latter being just as much a discussion of that incident as Wilburn engaged in. As to (1), I discredit Wilburn's testimony that she was not so advised; as to (2), I note that the testimony of Jenkins, Richards, Broadwater, nursing assistant Caroline Weems, and Sandman was in conflict. I find that General Counsel did not prove this fact by a preponderance of the evidence.

[37] Sec. 565G reads as follows:

> (a) *Definitions.*--In this section, the following words have the meaning indicated:
>
> (1) "*Abuse*" means any physical injury sustained or neglect which is detrimental to the physical or mental well-being of a patient in a nursing home resulting from cruel or inhumane treatment. "Abuse" does not include the performance of accepted medical procedures ordered by a licensed physician.
>
> (2) "*Nursing home*" means the definition found in § 566(e)(1) of this article.
>
> (3) "*Law-enforcement agency*" means any police department, bureau or force of any county or Baltimore City and police department, bureau or force of any incorporated municipality or the Maryland State Police.
>
> (b) *Duty to report.*--Any person who has reason to believe that a person in a nursing home has been abused shall report the abuse to an appropriate law enforcement agency and the Secretary of Health and Mental Hygiene. The report may be oral or in writing and shall

Continued

proceed under that statute and reported the incident to the Frostburg Police Department police even before talking with Schrock and Coleen Fisher, another nursing assistant who was Schrock's partner and was named by Seifarth as not permitting (with Schrock) the patient to wear the frocks she desired. On the following day, Thursday, Feburary 5, Roque suspended Fisher for the day, with pay. She was going to suspend Schrock that day, too, but Schrock had called in sick the preceding evening and did not report for work on Thursday. Schrock's normal day off was Friday; and so early in the morning on Saturday, February 7, Roque called Schrock into her office and announced that Schrock was suspended and that the matter had been turned over to the police. She also announced that she wanted Schrock to return as soon as Roque knew what was going on and the complaint had been cleared up.

The police then commenced its investigation. Seifarth was asked to repeat her story; she refused, on the ground that she did not wish to get anyone in trouble and did not wish the incident to go any further. Based on that, as well as the failure of the investigation to reveal anything otherwise supporting the charge, the police decided that no further action was warranted. Roque and Cyr, still dissatisfied, urged the police to conduct a more complete investigation and, when successful, arranged for interviews with other nursing assistants who worked in the same station as Schrock. Those interviews resulted in nothing new, and the police investigation was abandoned. Roque and Cyr, who had suspended Schrock on February 7, 1981, determined, allegedly in part on the basis of additional charges of "patient abuse" that had been made by nursing assistant Coleen Fisher, that Schrock should be discharged; and she was, on March 7, 1981.

Cursing at patients and refusing to attend to their needs are serious matters; and, if proven that they motivated Respondent to discharge Schrock, there would be little question that the complaint in Case 5-CA-13010 would have to be dismissed. The fact is, though, that Shrock had testified on January 21, 1981, during the initial stage of the hearing and had openly averred to her support of the Union; that Shrock had been for almost 2 years employed by Respondent with only one minor blemish, earning high ratings on her yearly evaluations from Respondent's supervisors and plaudits from the patients; and that Respondent's actions were not wholly consistent with the defense it now raises.

Notwithstanding my finding that Ostendorfe was a sincere and believable witness, I have substantial difficulty in understanding why Respondent proceeded as it did, particularly processing this matter under the Maryland statute, which defines "patient abuse" as a matter seemingly of much greater physical or mental mistreatment than that which can be attributed to Seifarth's charge. In fact, Roque testified that all she knew about the statute was that a notice had to be posted, and that notice required only that "physical or mental abuse" be reported to the police. Her failure to seek advice as to the scope of the statute—whether what Seifarth charged was "mental abuse"—and her reliance upon Ostendorfe's surmises, based on a seminar she had attended, seems to be a glaring omission. One does not normally file charges with the police, where the treatment of the patient might become a matter of adverse publicity, particularly where the statutory scheme results essentially in action against the Home.[38] Rather, Respondent's handbook (group I, rule 1) provides for a warning for "[d]iscourteous, unattentive or unprofessional treatment" or immediate termination for abuse (group III, rule 5) which, had Roque been so inclined, might have been utilized instead.

But assuming that Roque's perception was as she testified—that the charge against Schrock did constitute "mental abuse"—what transpired next bears directly upon Respondent's motivation. While the investigation proceeded, Schrock remained suspended from employment, not terminated. When the investigation resulted in the police determination not to prosecute, Roque was clearly displeased. Instead of letting the matter drop, Roque pressed for the police's further investigation, claiming that she was dissatisfied with the superficiality of the initial phase of police review, and made additional witnesses available. Only after she thought that the police once again had determined that no criminal prosecution was warranted, did Roque reach the decision to terminate Schrock. In the interim, Roque received charges of serious patient abuse from Fisher on February 7, and no new "facts" had developed from that date; yet a decision to terminate was made only after the police abandoned its investigation.

Respondent's delay in taking final action may be explained only by its desire to use the police investigation to give it a sound foundation to discharge Schrock. That was the reason why it prodded the police to pursue the matter after its initial investigation had ended. The pattern which she followed was the same as when Roque prompted Jenkins to file criminal charges against Wilburn and offered her aid in doing so. When the police

contain as much information as the person making the report is able to provide.

(c) *Investigation.*—(1) The law enforcement agency shall make a thorough investigation of the reported abuse and shall attempt to insure the protection of the victim.

(2) The investigation shall include a determination of the nature, extent, and cause of the abuse, the identity of the accused, and all other facts or matters found to be pertinent.

(3) The law enforcement agency shall render a written report of its findings to the State's attorney, the Secretary of Health and Mental Hygience, and the administrator of the nursing home not later than 10 working days after the completion of the investigation.

(d) *Immunity from civil liability.*—Any person, except a person accused of abuse, who makes a good faith report under this section, or who participates in an investigation or in a judicial proceeding arising from a report, is immune from any civil liability for this action.

(e) *Signs specifying reporting requirements.*—(1) The Department of Health and Mental Hygiene shall supply to each nursing home signs specifying the reporting requirements of this section.

(2) The signs shall be posted conspicuously in employee and public areas of the nursing home.

[38] Despite what the police told Cyr, and what the police understood, it is probably accurate that the filing of charges did not constitute a criminal proceeding. No authority has been cited to demonstrate that mental abuse of a resident is a crime. Rather, the freedom from abuse is a part of a "patient's bill of rights," art. 43, § 565C(a)(7); and a violation of that right commences a procedure to correct such violation, under penalty of the nursing home's loss of license. Art. 70B.

investigation of Schrock did not attain Roque's desired goal, Roque felt necessary to move on her own.

And, because the investigation ended in failure, Roque felt compelled to support the discharge with reasons other than "patient abuse." Thus, in her letter of discharge, Roque stated:

> Due to your refusal to cooperate with the police, they felt unable to continue with their investigation and recommended that we handle it internally.
>
> Since you have refused to cooperate with us and the police, I have decided, after much deliberation and consultation with State Official, Our Attorney, and TLSA Executive, to terminate you.

These alleged reasons are pretextual. One was based on Schrock's failure to appear for an interview by the police; but Cyr was specifically advised by the investigating police officer that an accused in a criminal investigation has the right to remain silent. Thus, Schrock's refusal to be interviewed was not a reason.[39] Schrock's asserted failure to cooperate with Respondent similarly lacks merit. Roque conceded that she never asked Schrock about her alleged behavior and sought to shift the burden of coming forward to Schrock, whom she claimed never presented her side of the story. But, because Cyr had been advised by the police that Respondent's charges were criminal, advice which I infer he communicated to Roque (Cyr did not testify at the May hearings), Respondent could not reasonably expect that Schrock would initiate an interview. I find the reasons given in the letter unworthy of belief.

So, too, do I find Fisher's testimony. Fisher alleged that she had, as Schrock's working partner, observed Schrock's mistreatment and abuse of patients for over 2 years—the conduct ranging from cursing and calling patients "elephants" and "dead," to slamming patients into sides of beds, hitting one on the head with a hairbrush and spraying perfume into her face, and giving a patient an unprescribed laxative. It was only after Seifarth complained, however, that Fisher brought forth her history of Schrock's abuses, feeling that Seifarth's action was a catharsis which permitted the truth to finally be told.[40] However, it was also at that time that Fisher, who was suspended with Schrock, a suspension (paid) which lasted only a day, had recently been issued two warnings as a result, she thought, of Schrock's complaints that Fisher was not giving patients adequate care. A third violation of Respondent's rules would have subjected Fisher to discharge. Thus, when she was suspended, her job was in grave jeopardy and that is the precise moment she recalled the past 2 years' excesses of Schrock's behavior.

Apparently, Fisher's statement and testimony have been personally beneficial. Whereas Shirley Yutze was disciplined for not telling Roque about the bickering between Wilburn and Jenkins which led up to the incident in the parking lot, Fisher was not disciplined (her third warning) for not reporting all of Schrock's activities. Roque stated at the hearing that she simply had not had time to consider the matter, but it was still pending. I do not believe her.

Further, in observing Fisher's demeanor, I found her to be entirely embittered against Shrock; and, finally, I found her testimony of Schrock's patient care to be expansive, inflated, and sometimes imaginative and contradictory. In particular, it may be merely coincidental, but I find it significant that all of the alleged instances involved patients who were incompetent or deceased, so that no rebuttal could be heard from those involved. One of Respondent's witnesses, Norma Lee McKenzie, although critical of Schrock's rough handling of and speech to patients,[41] preferring herself to a lower keyed, more gentle approach, witnessed none of the extraordinary events to which Fisher testified. I cannot imagine that, on only Fridays, when McKenzie regularly worked with Schrock, did Schrock cease the continuous and consistent flagrant activities of which she was accused by Fisher. I also find it wholly improbabe that Shrock should have exhibited misconduct solely to incompetents for 2 years, yet suddenly turn her attention on February 4 to Seifarth, who (all agree) was a competent and aware resident. Fisher's explanation for not coming forward with her complaints is lame, indeed. First, she stated that her complaint to Shockey and King was disregarded. Then, she averred that she felt that the pressure of the union organizing campaign—with her opposed to the Union and many others of her coworkers being in favor of the Union—caused her to avoid further friction. Yet, the friction was already present by reason of complaints against her; and, assuming that friction was the reason for Fisher's abstinence, her failure to complain in early 1979, when there was no union campaign, was wholly unexplained.

Schrock's evaluations were consistently high, although it is certainly possible that some of her misdoings were hidden from the view of her supervisors. However, that possibility wanes in light of Schrock's recent award by patients as the best nursing assistant, with her name and picture exhibited prominently in the patients' newsletter. And, in a sense, discussion of whatever problems there were in Schrock's care of Seifarth was initiated by Schrock, who, assigned to Seifarth's care only on about January 6, 1981, spoke twice to her RN about the problems she was having and asked about the possibility of switching patients because she could not comply with what she thought were Seifarth's unwarranted de-

[39] Actually, Schrock refused to be questioned, on advice of counsel, unless such an interview was required by the police. Such request was never made.

[40] Fisher stated that she complained once, to LPN Marla Shockey and RN King, that Schrock was not bathing patients as she should. However, she made no mention of patient abuse, a subject more likely to be the subject of a complaint. Fisher also testified that, because of Schrock's persistent abuse of patients, she requested that another partner be assigned to her. Her request was granted. Yet, in late 1980, when she was reassigned to be Schrock's partner, she made no complaint. I find her testimony most unlikely and credit Schrock's testimony that Fisher requested that she be reassigned as Schrock's partner.

[41] McKenzie testified only to support Respondent's position at the hearing. There is no indication that her appraisal was relied on by Respondent in making its decision to suspend or discharge Schrock.

mands.[42] In other words, Schrock cared about her interaction with her wards, an attitude which differs markedly from the manner in which she was generally portrayed by Respondent at the hearing.[43]

I do not belittle or downgrade Seifarth's allegations, nor do I find that she inaccurately described what Schrock did.[44] But, in considering the record as a whole, I must similarly be cognizant of the facts leading to the discharge of Wilburn, and particularly the allegations made by resident Abby McMullen, who accused Cyr of attempting to make her spy on Wilburn, and Respondent's precipitate brushing away of that accusation. That is to be contrasted with Respondent's immediate concurrence with Seifarth's charges. Seifarth's later position that she did not desire to get anybody in trouble (arguably neither a reaffirmation nor a disavowal of what she had earlier charged) could not assuage Roque.

The gist of an 8(a)(3) complaint is motivation. I am not persuaded that Schrock, who had testified against Respondent (and Roque personally) shortly before February 4, 1981, was disciplined without regard to that testimony or her avowed union preference.[45] Clearly, disparity has been shown. Yutze was disciplined; Fisher was not. Schrock was; Keller was not. McMullen was not believed, when it was helpful to support Wilburn's discharge; Seifarth was believed, when it was helpful to support Schrock's discharge.[46] During Roque's interview of Schrock on February 7, Schrock questioned her indefinite suspension, citing a 3-day suspension of employee Kate Preston, who pushed a patient's wheelchair against a wall and called the patient a "miserable son of a bitch." Roque brushed aside those comments as none of Schrock's business, but it is surely the business of the Board to determine whether Schrock was treated differently and to make inferences from the differing treatment. So, too, the shifting of reasons for discipline has often been utilized to support an inference of illegal motive, and, here, Respondent's counsel could not quite make up his mind whether "non-cooperation" with the police and Respondent was or was not a reason; and I find that it has no substance. Finally, I note that Roque wrote to the Maryland Division of Licensing and Certification and complained of the inadequacy of the police investigation; notified it of the termination of Schrock, Schrock's filing of an unfair labor practice charge, the investigation by the Board's Regional Office of that charge, and Roque's feeling that a hearing would be held; and noted that "[S]trange things are going on," including chemical burns on patients' buttocks, cursing, and maltreatment of patients, and "a sprinkler head knocked off causing two of three dryers to blow out." Roque further stated:

> Please forgive me for rambling on. I feel we have a good facility [with] the majority of our staff concerned, caring people, but when our residents start to be used as *pawns* I can no longer tolerate it! . . . [Emphasis supplied.]

In context, Roque's complaint was that the residents were being used to further the cause of the Union and that it was union activity that resulted in "[S]trange things." The specter of the Union's malevolence, disparate treatment, shift of reasons, and hasty reliance on rather incredible accusations persuade me that, but for Schrock's known union activities and her testimony on January 21, 1981, the events of February 4 would never have steamrolled in the way they did; and that had Schrock not been a union supporter and not testified on January 21, the charges made by Seifarth would have been handled entirely differently, at the very least with a degree of delicacy and fairness as was exhibited to Keller.[47] I conclude that Respondent, by suspending Schrock on February 7 and discharging her on March 7, 1981, has violated Section 8(a)(3), (4), and (1) of the Act.

III. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section II, above, occurring in connection with Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and lead to labor disputes burdening and obstructing commerce and the free flow thereof.

[42] Most of the witnesses for the General Counsel and Respondent agreed that Seifarth was a "demanding" patient, desiring that all attention be directed first to her, to the exclusion of other residents—although there was some difference of opinion as to the degree of her demands.

[43] RN Belinda Cosgrove, whom I found credible, testified that Schrock was a capable nursing assistant.

[44] Rather, I find that there was some interaction between Schrock and Seifarth the morning of February 4, prompting Schrock's telephone call to Cosgrove that evening, in which Schrock again said there were some problems in her care of Seifarth which she wanted to discuss the following morning at work. However, that conversation played no part in Respondent's decision to suspend and ultimately terminate Schrock (nor did Cosgrove play any role in that decision).

[45] Respondent argues that on February 7, Schrock never denied to Roque that she had cursed at Seifarth. In a sense, that is true. According to Schrock's testimony, when Roque accused her of cursing, her only reply was to ask what curse words she was supposed to have used, to which Roque did not reply. Thus, there was really no accusation which Schrock had an opportunity to deny. According to Roque's testimony of the same interview, Roque never even mentioned that Shrock was accused of cursing, which, of course, would have given no cause to deny the use of obscenities. I accept Schrock's narration, finding implicit in her question to Roque a denial of wrongdoing.

[46] Respondent contends that the mental condition of Seifarth and McMullen justified its decision to rely or not on various statements they made. Thus, whereas Seifarth was coherent, McMullen "internalized" all events around her. General Counsel's witnesses testified, however, that McMullen was coherent and able to describe accurately what was going on. There was sufficient circumstantial evidence presented to support the conclusion that Cyr desired to talk to her and that her words should not have been dismissed with impunity.

[47] In so concluding here, as well as in my conclusions regarding the other discriminatees, I have been cognizant of the principles set forth in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), which has been cited by both General Counsel and Respondent in their briefs. I conclude that General Counsel Counsel has, in each instance, made "a *prima facie* showing sufficient to support the inference that protected conduct was 'a motivating factor' in the employer's decision," and Respondent has not demonstrated that its discharge of any of the discriminatees would have taken place in the absence of the protected conduct. *American Tool & Engineering Co., Inc.*, 257 NLRB 608, fn. 4 (1981).

IV. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, post an appropriate notice, and take certain affirmative action designed to effectuate the purposes and policies of the Act. Because I have found that Respondent discharged Ronald Hartman, Eleanor Bennett, Elizabeth Loar Beckman, and Sally Wilburn, and suspended and discharged Arlene Schrock in violation of the Act, I shall recommend that Respondent be ordered to reinstate them to their former positions, or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges,[48] and to make them whole for any loss of earnings they may have suffered by reason of their discharges, by paying them a sum of money equal to that which they normally would have earned absent the discharges and suspension, less earnings during such period, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[49]

Having found that Respondent unlawfully issued warnings to Hartman, Bennett, and Wilburn, I shall recommend that Respondent be required to revoke, rescind, and expunge the same from its employment and personnel records. Schrock testified that, when she was interviewed by Roque on February 7, 1981, she found in her personnel files a warning that had been issued to her more than a year before. According to Respondent's handbook, such a warning is stale and is not to be considered in future discipline of employees. Because Respondent has exhibited union animus and particularly directed its unlawful activities against the discriminatees herein, I shall recommend the same relief with regard to all warnings contained in the files of these discriminatees, even though some warnings were not discriminatorily motivated, because the warnings are now stale.

Having found that Respondent's rule prohibiting solicitation and posting of literature is overly broad, I shall recommend that it cease giving effect to such rule and rescind it insofar as it interferes with employees' Section 7 rights. *Eastern Maine Medical Center*, 253 NLRB 1230 (1980).

General Counsel requests that Schrock be reimbursed her attorneys' fees, if any, incurred as a result of the police investigation and that Respondent should be ordered to notify the Maryland Division of Licensing and Certification and any other state, municipal, or local agency contacted by Respondent, advising that the alleged patient abuse charge has been rescinded and that Schrock has been reinstated, as set forth above. These remedies are fully warranted, especially considering the harm that the charges might otherwise cause to Schrock, should she ever seek other employment. *The United Credit Bureau of America, Inc.*, 242 NLRB 921, 927 (1979), enfd. 643 F.2d 1017 (4th Cir. 1981); *Liberty Mutual Insurance Co.*, 235 NLRB 1387 (1978), enforcement denied on other grounds 592 F.2d 595 (1st Cir. 1979).

Because Respondent has discriminatorily discharged five employees because of their union activities and engaged in numerous unfair labor practices which directly impinge upon the exercise of employees' Section 7 rights, I conclude that its violations are egregious and will recommend the issuance of a broad cease-and-desist order. *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[50]

The Respondent, Tressler Lutheran Home for Children t/a Frostburg Village of Allegany County Nursing Home, Frostburg, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating its employees concerning their union activities and sympathies and the union activities and sympathies of other employees.

(b) Instructing its employees to remove union pins from their uniforms.

(c) Creating an impression among its employees of surveillance of their activities on behalf of the Union.

(d) Promulgating, maintaining, and enforcing any rule or regulation prohibiting its employees from soliciting on behalf of any labor organization on Respondent's premises areas other than immediate patient care areas, during employees' nonworking time, or prohibiting without Respondent's written authorization the distribution of union literature in nonworking areas during employees' nonworking time, and reprimanding or warning employees for violation thereof.

(e) Directing its employees not to talk about the Union in its facility or on company time.

(f) Promising its employees greater wage increases should they not select the Union as their collective-bargaining representative.

(g) Threatening its employees with the loss of existing benefits and that Respondent would start from zero in bargaining with the Union should they select the Union as their collective-bargaining representative.

(h) Threatening its employees with discharge and unspecified reprisals for engaging in union activities.

[48] I raised, *sua sponte*, a question as to whether Hartman should be entitled to reinstatement if I found that Respondent had committed an unfair labor practice in discharging him. In his application for employment with Respondent, Hartman was not wholly candid about his reasons for leaving his prior employer. It appears, however, that the accusations which had been alleged against him by his prior employer were fully known by certain of Respondent's supervisors (as Respondent concedes in its brief) and that Respondent always obtained a reference from the prior employer before hiring a new employee. It thus appears that there is no justification for not affording Hartman the complete relief to which he would otherwise be entitled.

[49] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[50] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(i) Discharging, suspending, or otherwise disciplining its employees because of their membership in, assistance to, or activities on behalf of the Union.

(j) Discharging, suspending, or otherwise disciplining its employees because they have testified in a proceeding under the Act.

(k) Filing charges against its employees of mental or physical abuse with any police department or with the Maryland Division of Licensing and Certification where it has no reasonable cause to believe that any abuse has been committed and where such charges are filed solely because its employees are members of, are assisting, or are active on behalf of the Union, or have testified in a proceeding under the Act.

(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Ronald Hartman, Eleanor Bennett, Elizabeth Loar Beckman, Sally Wilburn, and Arlene Schrock immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings that they may have suffered by reason of Respondent's discrimination against them, in the manner set forth in "The Remedy" section of this Decision.

(b) Reimburse Arlene Schrock for all legal expenses incurred in her defense of the charges of physical and mental abuse filed by Respondent with the Frostburg Police Department and the Maryland Division of Licensing and Certification.

(c) Notify, in writing, the Maryland Division of Licensing and Certification, the Frostburg Police Department, and any other state, municipal, or local agency contacted in connection with its charges against Arlene Schrock, that all references to alleged patient abuse by her are rescinded and that she has been reinstated to her former position of employment, with full rights and privileges, pursuant to an Order of the National Labor Reiations Board; and send copies of said notices to Schrock.

(d) Revoke, rescind, and expunge from its records all written warnings and suspensions issued to Ronald Hartman, Eleanor Bennett, Elizabeth Loar Beckman, Sally Wilburn, and Arlene Schrock.

(e) Cease giving effect to and rescind its rule prohibiting solicitation, distribution or posting of material or notices without prior written authorization from its administrator insofar as it applies to the exercise of employees' rights under Section 7 of the Act in areas of its facility other than those involving immediate patient care and insofar as it prohibits distribution of union literature during employees' nonworking time in areas other than immediate patient care areas of its facility.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(g) Post at its facility in Frostburg, Maryland, copies of the attached notice marked "Appendix."[51] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint is Case 5-CA-11890 be dismissed insofar as it alleges violations of the Act not specifically found herein.

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[51] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."